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Patrick J. Donovan
Direct Phone: (202) 373-6057
Direct Fax: (202) 373-6001
Patrick.donovan@bingham.com

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Federal Communications Commission
Office of the Secretary

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VIA HAND DELIVERY

November 2, 2007

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Suite 5-C327
Washington, DC 20554

Re: *Ex Parte*, Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172

Dear Secretary Dortch:

In accordance with the Second Protective Order in the above-referenced proceeding,[1] enclosed for filing are two copies of the redacted version of the attached letter being submitted by 18 CLECs.

Under separate cover and in accordance with the Second Protective Order in this proceeding,[2] copies of the Highly Confidential Information are being submitted to you along with Gary Romondino, Jeremy Miller and Tim Stelzig of the Wireline Competition Bureau. Certain other individuals at the Commission are also being provided a copy of the unredacted version of this filing.

To the extent any party wishes to access the Highly Confidential Information associated with this filing, it should send its request in writing to Christine Johnson (christine.johnson@bingham.com) and Stu Eaton (stu.eaton@bingham.com) along with executed Acknowledgments of Confidentiality associated with the Second Protective Order.

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

202.373.6000
202.373.6001
bingham.com

[1] *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas,* WC Docket No. 06-172, Order, 22 FCC Rcd 892, DA 07-208, ¶ 15 (WCB rel. Jan. 25, 2007) ("Second Protective Order").

[2] *Id.*

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Also enclosed is an extra copy of this redacted filing, please date stamp and return it to the courier. Should you have any questions about this filing, please contact me.

Sincerely,

Patrick J. Donovan

Enclosure

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Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Philip J. Macres

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Re: *Ex Parte*, Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172

Dear Ms. Dortch:

In this letter, the undersigned carriers respond to the October 10, 2007 *ex parte* submission by Verizon, purporting to show the extent of competition in the six relevant MSAs.[1] Verizon submitted maps depicting CLEC fiber routes, CLEC lit buildings, and wireless cell sites; comparisons of competitors' use of special access, UNEs, and Wholesale Advantage service; tables showing CLEC fiber miles and numbers of buildings with competitive fiber; and profiles and website pages of competitive providers. This information does not show the extent of competition in these MSAs, and does not otherwise support the requested forbearance, for a number of reasons.

Verizon Does Not Provide A Wire Center Analysis. An overarching point is that Verizon's new information does not show the level of facilities-based competition at the wire center level. Therefore, this data, at best, is relevant to Verizon's request for forbearance from dominant carrier regulation, but not to its request for UNE forbearance. The Commission found in the *Omaha Forbearance Order* and reiterated in the *Anchorage Forbearance Order* that, with respect to UNEs, "it is appropriate for [the Commission] to use the wire center service area as the relevant geographic market."[2] Because

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

202.373.6000
202.373.6001
bingham.com

[1] Letter from Joseph Jackson, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172, (filed Oct. 10, 2007) ("Verizon October 10, 2007 *Ex Parte*").

[2] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶¶ 61-62 (2005) ("*Omaha Forbearance Order*") *petitions for review denied in part, dismissed in part*, *Qwest Corp. v. FCC & USA*, 482 F.3d 471 (D.C. Cir. 2007); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area,* WC Docket No. 05-281, Memorandum

Verizon has not provided any wire center data, its October 10 submission is irrelevant with respect to UNE obligations.

Competitive Facility Maps. Verizon provided several maps for each MSA purportedly showing central offices served by competitive fiber, CLEC fiber routes, CLEC lit buildings, buildings used by CLECs using special access, and cell sites.[3] These maps show lines and various square, triangular, or diamond dots to show the locations of competitive facilities. But the small size of the maps, and size of the dots make it impossible to identify any particular streets or buildings. Each dot supposedly identifying a building is so large and out-of-scale, in comparison to the size of the maps, it likely covers scores of city blocks and hundreds of business locations. Similarly, the lines depicting fiber routes are so large and out-of-scale in comparison to the size of the maps that it is impossible to determine along what routes fiber actually exists. Most of the City of Boston is blotted out by these lines, creating the false impression that every street in that city has competitive fiber. As a result, Verizon's maps are for all practical purposes illegible. No one reading these maps could possibly identify particular buildings served by competitive fiber or locations of competitive fiber routes.[4] Nor do the maps show Verizon's extensive fiber plant and number of lit buildings to provide the true perspective of just how limited competitive facilities are in relationship to Verizon's.

Competitive Fiber Transport and CLEC Lit Buildings. Verizon submitted a table for each of the six MSAs purporting to show the miles of fiber transport in the MSA provided by selected competitive carriers.[5] Verizon also submitted tables purporting to

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Opinion and Order, 22 FCC Rcd 1958, FCC 06-188, ¶ 14 (rel. Jan. 30, 2007) ("*Anchorage Forbearance Order*").

[3] *See* Verizon October 10, 2007 *Ex Parte,* at Attachment H.

[4] As the Commission found in the *TRRO*, such maps have "little probative value" and their "value ... is undermined by several shortcomings." *See Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, ¶ 187, n.445 (2005) ("TRRO" or "*Triennial Review Remand Order*"), *aff'd, Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) "Due to the wide variability in market characteristics within an MSA," the Commission found that MSA-wide conclusions based on fiber deployment maps "would substantially overpredict the presence of actual deployment, as well as the potential ability to deploy." *Id.* ¶ 82 Indeed, among other things, maps fail to indicate "the capacity of service ... along the competitive routes identified; if those locations require capacity only at multiple DS3 or higher capacities, and are providing revenues commensurate with those capacities." *Id.* ¶ 187 In addition, maps "do not indicate whether carriers operating the fiber depicted are using these facilities to provide local service or merely interoffice transport, long-distance service, wireless service, or some combination of services other than local exchange service." *Id.* ¶ 188

[5] *See* Verizon October 10, 2007 *Ex Parte,* at Exhibit 1.

show the number of buildings in each MSA to which CLECs have deployed fiber-based equipment.[6]

As in its maps, Verizon fails to identify its own fiber miles or its own fiber lit buildings within the MSA. Without this information, it is impossible to know how competitively significant the reported miles and buildings are, even in the aggregate. The figures for Verizon would likely overwhelm competitors' figures. In fact, Verizon's information is consistent with, and does not refute, findings by GAO[7] and the DOJ,[8] as well as the results of studies already in the record of this proceeding,[9] that competitors have extended fiber to a very small number of buildings.[10] And even where they have installed fiber rings, it is rarely economically feasible to extend fiber laterals to buildings for certain capacity levels as already found by the Commission.[11] For example, Cavalier has some fiber in some of the MSAs in question that it uses for transport, but the level of demand by its residential and small business customers does not make it economically feasible to extend laterals to buildings except in a few instances.

Further, Verizon's reported numbers are inaccurate. Verizon reports that Integra Telecom has lit buildings in **[Begin Highly Confidential] -- [End Highly Confidential]** MSAs, McLeodUSA in **[Begin Highly Confidential] -- [End Highly Confidential]** and ITC^Deltacom in **[Begin Highly Confidential] --[End Highly Confidential]**. In fact, however, these carriers have no lit buildings in these MSAs. Verizon has also listed entities that are not carriers such as Computer Associates, Federal Express, GEICO, Gilette, Motorola, Pfizer, and Trans World Airlines. Moreover, it appears that Verizon's lit building count improperly includes carrier locations at POPs and collocation hotels, where there is no service to end users, and counts these buildings multiple times because

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6 *See* Verizon October 10, 2007 *Ex Parte,* at Exhibit 2.

7 *See FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report to the Chairman, Committee on Government Reform, U.S. House of Representatives, Government Accountability Office, GAO-07-80 (Nov. 2006) ("*GAO Report*"), at 12-13.

8 *United States v. Verizon Comms. Inc. and MCI, Inc.*, No. 1:05CV02103 (HHK), Department of Justice Competitive Impact Statement (D. D.C. filed Nov 16, 2005) at 6.

9 *See* Letter from John J Heitman, Counsel for XO Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket. No. 06-172 (filed Oct. 30, 2007) at 2-4; Comments of Broadview Networks, Inc., Covad Communications Group, Nuvox Communications, and XO Communications, LLC, WC Docket No. 06-172 (filed Mar. 5, 2007) at 47-48.

10 *See, e.g., Omaha Forbearance Order*, ¶ 67 (concluding that Qwest was the only provider of wholesale access in MSA demonstrating the lack of alternatives to BOC last mile facilities.).

11 *TRRO,* ¶¶ 149-155.

multiple carriers bring facilities there. The Commission cannot rely on these estimates of competitive carrier transport and lit buildings due to their demonstrated inaccuracy, even if they were otherwise probative of the extent of competition in the six MSAs or relevant to the forbearance analysis.

Competing Carriers Using Verizon Special Access or Wholesale Advantage. Verizon submitted two sets of tables concerning the extent to which competitors use special access versus UNEs. First, it provides tables showing that a number of "selected" carriers compete in each MSA using Verizon special access.[12] Second, at the request of FCC staff, Verizon has supplemented Exhibit 10 to its Reply Comments to include services purchased by all carriers in each MSA for which Verizon seeks forbearance including DS0s. Verizon contends that although some carriers rely extensively on UNEs, most rely on Verizon's Wholesale Advantage and Special Access services, rather than UNEs, including DS0 UNEs, for access to end users in the six MSAs.[13]

As a preliminary matter, the Commission cannot rationally rely on special access as a platform for viable local service competition that could justify forbearance at the same time that it is examining the need to reform special access rules, and when there is substantial evidence in the record of the *Special Access NPRM*[14] proceeding that BOCs have used Phase II pricing flexibility to raise prices, are earning unconscionable rates-of-return, and are imposing unreasonable non-price terms and conditions.[15] As already noted, other agencies and independent studies show that competitors have no alternatives to BOC last mile facilities for access to the vast majority of buildings.[16] UNE pricing is a

[12] Verizon October 10, 2007 *Ex Parte* at Exhibit 3.

[13] Verizon October 10 *Ex Parte* at Exhibit 10 Supplement.

[14] *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, FCC 05-18 (rel. Jan. 31, 2005) ("*Special Access NPRM*").

[15] *See, e.g.,* Letter from Andrew D. Lipman, Counsel for ATX Communications, Inc. *et al.* to Marlene H. Dortch, Secretary, FCC WC. Docket 06-172 (filed Sep. 4, 2007) at 25-28; *see also* Opposition of ACN *et al.*, WC Docket No. 06-172 (filed mar. 5, 2007) at 35-37, 60-63; *see also* Comments of ATX *et al.*, WC Docket 05-25, RM-10593 (filed Aug. 8, 2007); Reply Comments of ATX *et al.*, WC Docket 05-25, RM-10593 (filed Aug. 15, 2007).

[16] *See GAO Report* at 12-13; *United States v. Verizon Comms. Inc. and MCI, Inc.*, No. 1:05CV02103 (HHK), Department of Justice Competitive Impact Statement (D. D.C. filed Nov 16, 2005) at 6; Letter from John J Heitman, Counsel for XO Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket. No. 06-172 (filed Oct. 30, 2007) at 2-4; Comments of Broadview Networks, Inc., Covad Communications Group,

"check on special access pricing."[17] In the absence of UNE obligations, BOCs would be able to raise special access prices with even less constraint than they already face.[18] Therefore, the Commission's finding in the *Triennial Review Remand Order*[19] that it would be a "hideous irony" to rely on Verizon's special access tariff offerings as the basis to relieve Verizon of its unbundling obligations applies equally with respect to Verizon request for forbearance from its Section 251(c)(3) unbundling obligations.

In any event, even if competitors' use of special access could support forbearance (which it does not), Verizon's information is not useful for measuring competitors' reliance on special access because Verizon provides information only for "selected" carriers. However, nowhere in Exhibit 3 of Verizon's October 10, 2007 *Ex Parte* does Verizon include the large purchasers of UNEs. It is well-known that a few CLECs have chosen a business strategy based on purchasing special access to serve large enterprise users, typically under customer-specific commitment contracts, but this does not lessen the potential impact of forbearance on consumers and small businesses who buy service from UNE-based CLECs.[20] The Exhibit 3 special access demand versus UNE demand figures are unrepresentative of the extent to which competitors rely on special access for local service because most of the carriers listed are primarily IXCs or wireless providers, including **[Begin Highly Confidential] -- [End Highly Confidential]** and are not permitted to use UNEs for the "exclusive provision of mobile wireless or interexchange services."[21] For similar reasons, the UNE demand in Verizon's summary totals in its Exhibit 10 Supplement "All Carriers Excluding Major LD and Wireless Carriers" is understated because it still includes the special access demand of carriers such as **[Begin Highly Confidential] -- [End Highly Confidential]** that may not be eligible to obtain UNEs for the services they provision.

Further, now that Verizon at the request of staff has corrected for the previous omission of DS0 UNEs, it is clear that CLECs rely on them most of the time. The **[Begin Highly Confidential] -- [End Highly Confidential]** DS0 UNEs used by competitors excluding major LD and wireless carriers in the six MSAs that Verizon has now disclosed dwarfs the **[Begin Highly Confidential] -- [End Highly Confidential]** DS1 and

Nuvox Communications, and XO Communications, LLC, WC. Docket No. 06-172 (filed Mar. 5, 2007) at 47 - 48.

[17] *TRRO*, ¶ 65 (explaining that "without recourse to TELRIC-priced UNEs, carriers using special access could lose substantial bargaining power when negotiating special access rates").

[18] *Id.*

[19] *TRRO*, ¶ 59.

[20] *See TRRO*, ¶ 64 (explaining that "a carrier's use of a tariffed offering may not indicate that competition without UNEs is possible in the long term").

[21] *See* 47 C.F.R. § 51.309(b).

DS3 UNEs that Verizon reports and the *de minimis* DS0 special access channel termination demand.[22] Moreover, CLECs have invested enormous amounts in equipment that "unleashes the full potential embedded [DS0] copper loop plant"[23] and are able to provision innovative, reliable and cost-effective DSL, video, and other advanced services that have fiber-like speeds of 5-30 Mbps over such copper plant.[24] It is therefore misleading to compare UNE and special access demand on the assumption that a DS0 copper loop will carry only a single voice channel. While Verizon's Exhibit 10 Supplement breaks down UNE and special access demand data for "All Carriers Excluding Major LD and Wireless Carriers" by DS0, DS1, and DS3 loops/channel terminations, the total demand for these UNE loops is **[Begin Highly Confidential] -- [End Highly Confidential]** and total demand for these special access channel terminations is **[Begin Highly Confidential] -- [End Highly Confidential]**. In short, UNEs constitute about **[Begin Highly Confidential] -- [End Highly Confidential]** of the combined demand for loop facilities.

The demand for Wholesale Advantage does not reduce the UNE demand percentages and if anything, increases it. Wholesale Advantage is Verizon's UNE-P replacement service, and includes a UNE loop as a component of the service. Both the *Omaha* and *Anchorage* orders made it clear that services provided over UNEs cannot be considered as competitive alternatives in considering UNE forbearance.[25] If Wholesale Advantage is excluded, competitors rely on UNEs **[Begin Highly Confidential] -- [End Highly Confidential]** of the time, as calculated from Verizon's information. In any event, because UNE loops are critical components of the Wholesale Advantage offering, total DS0 UNE demand should include demand for DS0 UNE loops used independently and with Verizon's Wholesale Advantage.

Further, **[Begin Highly Confidential] -- [End Highly Confidential]** of all the Wholesale Advantage lines reported are in the New York MSA alone. And most of that is likely attributable to low-cost Zone 1 TELRIC loops in Manhattan. In other markets, Wholesale Advantage is not a significant platform. In the residential market in particular, UNE loops are the essential platform for competition. As shown in Verizon's table, even if Wholesale Advantage lines are included, CLECs rely on DS0 UNEs in Virginia Beach

[22] *See* Verizon October 10, 2007 *Ex Parte*, at Exhibit 10 at 1.

[23] *See* Letter from Andrew D. Lipman, Counsel for Cavalier *et al.*, to Marlene Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Oct. 3, 2007) at 7..

[24] *See* Letter from Andrew D. Lipman, Counsel for Cavalier *et al.*, to Marlene H. Dortch, Secretary, FCC, WC. Docket No. 06-172 (filed July 10, 2007) at 3.

[25] Omaha Forbearance Order, n.185 (explaining that Granting Qwest forbearance from the application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance, and we decline to engage in that type of circular justification.); *Anchorage Forbearance Order*, n.92.

[Begin Highly Confidential]--[End Highly Confidential] of the time. Wholesale Advantage is used to provide service only to approximately **[Begin Highly Confidential]** -- **[End Highly Confidential]** of residential customers in Virginia Beach. Moreover, Wholesale Advantage demand is rapidly declining.[26] Verizon's data actually confirms, rather than disproves, that local service competition remains heavily dependent on UNEs.

Profiles of Competitive Providers of High Capacity Services/CLEC Websites. Verizon provides brief descriptions of competitive carriers as well as pages from competitive carriers' websites. All of this information is anecdotal and provided at an extremely high level of generality.[27] It simply does not demonstrate evidence of actual, sustainable, and robust competition. It does not show in any detail or specificity where competitors operate, the extent to which they provide service in any MSA or wire center, or the extent to which they provide service over their own facilities.[28]

To underscore how misleading and inaccurate Verizon's Attachment I is, this firm undertook to verify whether the carriers whose websites Verizon cites actually offer service in the Virginia Beach MSA. A paralegal at Bingham McCutchen LLP called the marketing department of nearly every firm represented by Verizon as relevant to this proceeding and asked whether it offered service in Virginia Beach. Of the 50 carriers included in Verizon's Attachment I and I Supplement, five carriers said they did offer service, six were unable or unwilling to answer, and 39 said they did not offer service there. At least in this MSA (which was the only one we were able to sample due to time constraints), the information provided by Verizon is completely unreliable and unrevealing of the extent of competition.

To the limited extent it is even intelligible and reliable, Verizon's showing here is consistent with the substantial information already in the record that competitors have very few of their own connections to buildings and that Verizon continues to control access to the vast majority of customer locations in the MSAs in question, as well as elsewhere.

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[26] *See* Letter from Andrew D. Lipman, Counsel for Cavalier *et al.*, to Marlene Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Oct. 3, 2007) at 5.

[27] *See* Verizon October 10, 2007 *Ex Parte,* at Attachment I and I Supplement.

[28] Verizon's list of regional providers unhelpfully includes providers such as Integra Telecom, Inc. that do not operate anywhere in the Verizon East region. Verizon's descriptions of systems integrators is useless because they are not facilities-based competitors. Instead, they rely on other carriers, including Verizon or other BOCs, to provide service. By listing systems integrators, Verizon double counts competitive sources that it has already mentioned.

For these and all the reasons previously stated by the undersigned carriers in this proceeding, the Commission should deny the petitions.

Sincerely,

Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Philip J. Macres

Attorneys for

Alpheus Communications, L.P.;
ATX Communications, Inc.;
Cavalier Telephone Corporation;
CloseCall America, Inc.;
DSLnet Communications, LLC;
Eureka Telecom, Inc. d/b/a
InfoHighway Communications;
Deltacom Communications, Inc.;
McLeodUSA Telecommunications
Services, Inc.;
MegaPath, Inc
Mpower Communications Corp.;
Norlight Telecommunications, Inc.;
Penn Telecom, Inc.;
RCN Telecom Services, Inc.;
RNK Inc.;
segTEL, Inc.;
Talk America Holdings, Inc.;
TDS Metrocom, LLC; and
U.S. TelePacific Corp. d/b/a
TelePacific Communications